



# Commonwealth of Massachusetts

## State Ethics Commission

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### CONFLICT OF INTEREST OPINION EC-COI-92-40\*

#### FACTS:

You are the Executive Director of the Martha's Vineyard Land Bank Commission and you seek an opinion concerning the activities of real estate brokers who also serve as Land Bank Commissioners or town advisory board members. In 1990 you requested an opinion from this Commission concerning whether G.L.c. 268A applied to the Land Bank Commission and, if the conflict law did apply, you asked us to address various situations under the law. In response to your request the Commission issued *EC-COI-90-2* which concluded that the Land Bank Commission was an independent municipal entity for purposes of G.L. c. 268A. In light of recent developments in the case law and Commission precedent we now are re-evaluating some of our conclusions in *EC-COI-90-2* within the context of your recent opinion request.

The Martha's Vineyard Land Bank (Land Bank) was established by Chapter 736 of the Acts of 1985 "for the purpose of acquiring and holding and managing land and interest in land." §2. The land interests identified in the statute are: "land to protect future and existing well sites, aquifers and recharge areas; agricultural lands; forest lands; fresh and saltwater marshes and other wetlands; ocean and pond frontage, beaches, dunes, and adjoining backlands; land to protect scenic vistas; land for nature or wildlife preserves; easements for trails and publicly owned land; land for passive recreational use." §5. According to the enabling legislation, the Land Bank is a public instrumentality and the Land Bank's exercise of its statutory powers is deemed to be "the performance of an essential governmental function." §2.

The Land Bank is administered by a seven member Commission composed of a member from each of the towns of Martha's Vineyard and the state Secretary of Environmental Affairs or her designee. §3. Each of the member towns elects one member to the Commission. The Commission has authority to acquire interests in land, exercise eminent domain powers, accept gifts of funds to further the Land Bank's purposes, incur debt, collect statutory fees and issue bonds and notes. §4. If authorized by a two-thirds town meeting vote, the Commission may, when incurring debt or securing an issue of bonds and notes, pledge the full faith and credit of each of the towns which comprise the Land Bank. §4. Each town is authorized to appropriate money for the Land Bank fund and to provide funds to repay bonds and notes. §4A.

The majority of the Land Bank's funding is derived from a 2% statutory fee based on the purchase price of any real estate property transfer in each of the member towns.<sup>1/</sup> §10. The statutory fee is the responsibility of the purchaser of real property. The fee is required to be paid to the Land Bank Commission and the purchaser is also required to provide a copy of the deed and an affidavit attesting to the purchase price or to the facts concerning why the transfer is exempt from the fee. §11. Upon receipt, the Land Bank Commission staff reviews the filing and will execute a certificate. The Dukes County Register of Deeds is prohibited from recording, registering, or accepting for recording any deed (except a mortgage deed) relating to a real property transfer which has not received a certificate from the Land Bank. §10. A list of land transfers, the value of the transaction and any exemptions is reviewed by the Land Bank Commission at its weekly meeting. The Commissioners may question the applicability of an exemption in a particular case or the validity of an affidavit but they do not review the sales agreements between the parties.

The Land Bank Commission has the authority to assess fines and penalties for failing to pay the fee and may hold hearings on the imposition of a fee, fine or penalty. The Land Bank Commission may institute court proceedings to collect fees and penalties and may file or register a lien in favor of the Land Bank against any of the purchaser's property for the amount of the statutory fee, including interest and penalties. §§13, 14.

Other funding sources include appropriations by the member towns, appropriations by the county, private contributions, and proceeds from the sale of property by the Land Bank. Fifty percent of the revenues collected remain in the Land Bank fund and are directly administered by the Land Bank Commission. The remaining revenues are placed in individual town accounts, according to a proportional formula, but the accounts are administered for the benefit of the Land Bank and title to the funds remains with the Commission until such time as the Commission dissolves. §8A.

Upon dissolution of the Land Bank, any of its land interests will be transferred to the town in which the land is located and placed under the management of the local conservation commission for continued protection. Any remaining funds will revert to the towns to be held in trust for the management and preservation of conservation land.

Chapter 736 of the Acts of 1985 also created town advisory boards in each member town, which assist the Land Bank Commission in administering the Land Bank. Each town's advisory board includes a representative appointed by each local conservation commission, planning board, board of assessors, board of health, park and recreation committee, board of selectmen and water commission. §1. Under c. 736, each advisory board exercises advisory duties, as well as binding veto powers over the Land Bank Commission regarding land located in said town. For example, each land acquisition by the Commission must be approved by the town advisory board in the town where the land is located, and any disposition of the Land Bank's interest or change in the use of the land must also be approved by the advisory board of the town in which the land is located and by the Secretary of Environmental Affairs. §§3, 6. A majority of the advisory boards are required to approve the Land Bank Commission's budget.

## **QUESTIONS:**

1. May a town advisory board member or a Land Bank Commissioner engage in outside employment as a real estate broker in land transactions which are subject to the statutory 2% fee?

2. May town advisory board members or Land Bank Commissioners serve as real estate brokers in land transactions in which the Land Bank is seeking to purchase the property?

3. May town advisory board members and Land Bank Commissioners participate in board discussions concerning lands which the Land Bank is seeking to

acquire if they believe they will market the property as real estate brokers?

## **ANSWERS:**

1. Yes.

2. A Land Bank Commissioner may not act as the real estate broker in a transaction where the Land Bank is a purchaser. A town advisory board member may not act as the real estate broker in a transaction involving the Land Bank unless he has received special municipal employee designation and is able to comply with an exemption under §17 and §20.

3. Land Bank Commissioners may not participate. An advisory board member may not participate unless he receives a written determination from his appointing authority pursuant to G.L. c. 268A, §19(b)(1).

## **DISCUSSION:**

### **The Land Bank Commission As A "Municipal Agency"**

In November, 1990 the Commission issued *EC-COI-90-2*, which concluded that the Land Bank Commission is an independent municipal entity for purposes of G.L. c. 268A. Since that time, the Massachusetts Appeals Court affirmed a Commission decision that members of a regional school committee are municipal employees under G.L. c. 268A. In doing so the Court concluded that a regional school district is an instrumentality of each

municipal member under G.L. c. 268A, §1(f). *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). In reaching this conclusion the Court considered the ordinary and approved use of the word “instrumentality” in the statute; the formation, operation and purpose of a regional school district; and the purpose of G.L. c. 268A. *Id.* at 425-428. The Court found that the municipalities use the school district as a means to fulfill their statutory obligation to provide education and that the municipalities played a substantial role in the creation of the district and the district’s financial matters. *Id.* at 427.

This Commission has expressly followed the Appeals Court’s reasoning in considering whether a regional entity is a municipal agency within the meaning of G.L. c. 268A, §1(f). *EC-COI-92-26*; 92-27. The Commission no longer considers regional municipal entities to be “independent” municipal entities.<sup>2/</sup> See *EC-COI-92-26*; 92-27; 92-15. Rather, the Commission will consider whether such entities are instrumentalities of each municipal member based on the ordinary and approved usage of the statutory language, the purpose of G.L. c. 268A and the form, operation and purpose of the regional entity.

Based on this precedent, we reaffirm our conclusion that the Land Bank Commission is a municipal agency within the meaning of G.L. c. 268A, §1(f) but we no longer will consider the Land Bank Commission to be an “independent municipal entity.” The Land Bank Commission is an instrumentality of each of the member municipalities. We conclude that the member municipalities play a significant role in the substantive work of the Land Bank Commission and control (through approval) the Land Bank’s budget. The Land Bank Commission serves the traditional role of the municipality in preserving and conserving land, particularly for purposes of future water supply protection and recreational use. By joining together as members of the Land Bank, the municipalities recognize the mutual land interests they share in protecting the coastline and preserving open space. Thus, as an instrumentality of each member municipality, the Land Bank Commission is analogous to any local board in the municipality. Further, for the reasons stated in *EC-COI-90-2* we reaffirm our conclusion that the Land Bank Commission shares more attributes with the municipal level of government than with other levels of government.

### **1. Land Bank Commissioners And Town Advisory Board Members Serving As Real Estate Agents In Land Transactions Subject To The Statutory Fee.**

G.L. c. 268A, §17(a) prohibits a municipal employee from receiving compensation<sup>3/</sup> from anyone, other than the municipality, in connection with a particular matter<sup>4/</sup> in which the municipality is a party or has a direct and substantial interest. Members of the Land Bank Commission and town advisory boards are municipal employees under the conflict of interest law. G.L. c. 268A, §1(g). The determination that a fee is owed or that an exemption applies is a particular matter in which the Land Bank and each municipality has a direct and substantial interest.<sup>5/</sup> See *Attorney General Conflict Opinion No. 28* (Commonwealth has direct and substantial interest in collection of taxes for revenue purposes).

At issue is whether the real estate broker’s commission is “in connection with” this determination. In past opinions we have recognized that not all work performed concerning a government matter is “in connection with” the matter. See *EC-COI-92-1*; 90-13 (work performed incidental to the permit); 87-31, n.7. In the sections of G.L. c. 268A pertaining to former public employees the Commission has identified certain factors to apply in deciding whether a former public employee’s private compensation is “in connection with” a particular matter in which he had participated as a public employee. We have considered the effect the proposed work would have on the government matter and whether the private work is “integrally related” to the government matter because they involve the “same parties, the same litigation, the same issues or the same controversy.” *EC-COI-92-17*. See, e.g., *EC-COI-91-1*; 89-7; 86-23.

We conclude that any compensation received by the real estate broker from a private land transaction is not “in connection with” the Land Bank Commission’s determination. Although the broker’s commission, similar to the statutory fee, is traditionally based upon the selling price, the commission is for services rendered in making the sale and is the obligation of the seller. The Land Bank has no authority or oversight of private land transactions on the Martha’s Vineyard (unless the Land Bank is a party to the transaction) other than to collect the fee. See *EC-COI-90-13* (Commonwealth will have direct and substantial interest where agency exercises substantial oversight or regulatory authority of an activity); 85-46 (Registry of Deeds has no substantial interest in filing of deed beyond ministerial filing). As a general rule, a municipality will not have the requisite interest as the real estate contract and the broker’s contract are between private parties and concern a private parcel of property. Cf. *EC-COI-86-23*.

If the broker's commission is solely for services rendered in negotiating the sale, the broker will not be receiving compensation in connection with a matter in which the Land Bank or a municipality has a direct and substantial interest. Our conclusion would be different if the broker received compensation for preparation of the affidavit or other papers to be reviewed by the Land Bank.

Accordingly, Land Bank Commissioners and advisory board members may conduct a private real estate practice and receive broker's fees from transactions in which seller and purchaser are private parties. To the extent that *EC-COI-90-2* reaches a different conclusion, the Commission now declines to follow that aspect of *EC-COI-90-2*.

## **2. Town Advisory Members And Land Bank Commissioners Participating As Real Estate Agents In Transactions For Land Which the Land Bank Seeks To Acquire**

### **Land Bank Commissioners**

A Land Bank Commissioner may not act as a real estate broker in a transaction in which the Land Bank is the purchaser under G.L. c. 268A, §17(c). Section 17(c) prohibits a municipal employee from acting as the agent or attorney for anyone, other than the municipality, in connection with a matter in which the municipality is a party or has a direct and substantial interest. Here, the Land Bank Commissioner, as the real estate broker for the seller, will be acting as the seller's agent in dealings with the Land Bank in a matter in which the Land Bank is a party.<sup>6/</sup>

If the Land Bank is the seller of the property, a Land Bank Commissioner may represent the Land Bank as the broker and receive a commission if he is a special municipal employee<sup>7/</sup> and receives an exemption under §20(d). Generally, G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency, in which the municipality is an interested party. An agreement for the purchase, sale or disposition of a piece of property is a contract for §20 purposes. *EC-COI-84-51*. A Land Bank Commissioner will have a financial interest in a purchase and sale agreement between a property owner and the Land Bank Commission if he receives a brokerage fee based on the selling price. *EC-COI-90-2*. Each municipality would be an interested party to the transaction as the Land Bank is an instrumentality of each of its members. Therefore, Land Bank Commissioners must seek the §20(d) exemption<sup>8/</sup> from the boards of selectmen of all of the member towns and file a disclosure with the Town Clerk in all of the member towns. *EC-COI-92-27*.<sup>9/</sup>

### **Town Advisory Board Members**

A town advisory board member will be prohibited by §17(c) from representing the seller in a transaction with the Land Bank, unless the advisory board on which he serves has been granted special municipal employee designation. G.L. c. 268A, §1(n). The §17 prohibitions apply to special municipal employees only in connection with particular matters in which the municipal employee has participated, or matters which are or within one year have been the subject of his official responsibility, or (if the employee serves more than 60 days in a calendar year) which is pending in the agency in which he is serving.

If the advisory board has received special municipal employee designation by the municipality's Board of Selectmen, a board member may act as the real estate broker for the seller provided that the transaction does not involve land which is subject to review by the board on which the member sits. Each advisory board is required to review purchases by the Land Bank in its town, so these matters are within the board member's official responsibility or are matters in which he will participate as a board member. Consequently, he may not act as the broker in land transactions in which the Land Bank is the purchaser of land and which will be reviewed by the board on which he serves.

Additionally, the advisory board member will be required to seek an exemption under G.L. c. 268A, §20 as he will have a financial interest in a contract made by a municipal agency, in which the municipality is an interested party. Therefore, the town advisory board members may not receive compensation from a sale of land to the Land Bank, unless an exemption applies.<sup>10/</sup>

If the town advisory board members receive special municipal employee designation, members of the Boards

may participate as real estate brokers in a sale involving the Land Bank as they will be eligible for an exemption under §20(d). Town advisory board members must seek the exemption from their local board of selectmen. In conclusion, if the Land Bank is the purchaser of the property, an advisory board member may act as the broker if he is a special municipal employee, the land is not located in the town in which he serves and he receives an exemption under §20(d). If the Land Bank is the seller of property, an advisory board member, similar to the Land Bank Commissioner may represent the Land Bank in the transaction if he is a special municipal employee and receives a §20(d) exemption.

To the extent that *EC-COI-90-2* reaches a different conclusion concerning transactions in which a Land Bank Commissioner or advisory board member is the broker and the Land Bank is a party, we now decline to follow *EC-COI-90-2*.

### **3. Town Advisory Board Members And Land Bank Commissioners Officially Participating In Discussions Regarding Property They May Market As Real Estate Agents**

Under G.L. c. 268A, §19, a Land Bank Commissioner or advisory board member must abstain in matters, such as a determination to purchase land, if he or a business organization in which he is serving as an officer, director, trustee, partner, or employee has a reasonably foreseeable financial interest. *In re Burgess*, 1992 SEC 570 (Planning Board member violated §19 by participating in matters concerning land which he knew or should have known that his employer, a real estate firm, would be marketing). We note that associates in a real estate firm are ordinarily considered to be “employees” for purposes of §19. *See In re Burgess*, 1992 SEC n.8; *EC-COI-89-30*; 83-34. If a Land Bank Commissioner knows, or if it is reasonably foreseeable, that he will market any land under discussion for acquisition by the Land Bank, he must abstain from such discussions.<sup>11/</sup> Also, a Commissioner must abstain from participating in any review and determination of fees and exemptions pertaining to a property transaction if he or his firm played a role in the sale and will collect a commission from the sale.

Advisory board members may obtain an exemption under §19(b)(1) which would permit them to participate in a matter, notwithstanding the conflict of interest. An advisory board member may participate in a particular matter involving his financial interest or his firm’s financial interest if, prior to participating, he (1) advises his appointing official of the nature and circumstances of the particular matter; (2) makes a full written disclosure to his appointing authority of the financial interest; and (3) receives a written determination in advance from his appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of his services to the Town. This determination may vary depending on the facts and, absent an exemption, an advisory board member must abstain from matters in which he or a real estate firm with which he is associated has a reasonably foreseeable financial interest. As elected officials, Land Bank Commissioners are not eligible for this exemption and will be required to abstain in all matters in which they have, or a business organization in which they are a partner, trustee, director, officer or employee has, a financial interest.

Finally, G.L. c. 268A, §23(c) prohibits a municipal employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information<sup>12/</sup> which he has gained by reason of his official position and from improperly disclosing such material or using such information to further his private interests. This section will prohibit a Land Bank Commissioner or advisory board member from using data developed during executive session board meetings to further his private real estate business. *See EC-COI-82-17* (photographer employed by state agency may not privately sell reprints of photographs taken as part of his state duties where the negatives are not generally available to the public or catalogued in a manner which permits public access).<sup>13/</sup>

### **Comparison With *EC-COI-90-2***

In light of recent developments in the case law and Commission precedent, this opinion changes the analysis of *EC-COI-90-2* as follows. For purposes of G.L. c. 268A jurisdiction the Land Bank Commission is a municipal agency and is an instrumentality of each of the member municipalities. Land Bank Commissioners may receive “special municipal employee” designation from the Board of Selectmen of all member municipalities.

Land Bank Commissioners may also accept outside employment as private real estate brokers but Land Bank Commissioners may not receive compensation or act as the broker in connection with a land transaction in which the Land Bank is the purchaser. An advisory board member may not receive compensation as a broker in

connection with a sale to the Land Bank, unless he is a special municipal employee, the land is not located in the town in which he serves and he receives an exemption under §20(d). If the Land Bank is the seller of the property, a Land Bank Commissioner or an advisory board member may represent the Land Bank as the broker and receive a commission if they are special municipal employees and receive an exemption under §20(d).

Land Bank Commissioners who also hold other local municipal positions may participate in their official capacity as Land Bank Commissioners in a matter in which their municipality has a financial interest because they are serving the municipality in each capacity. Similarly, Land Bank Commissioners who also serve as town advisory board members may participate in their official capacity as advisory board members in a matter in which the Land Bank has a financial interest.

**AUTHORIZED:** December 10, 1992

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1</sup>Certain land interests are exempt. St. 1985, c. 736, §12.

<sup>2</sup>See *McMann, supra.*, at 428, n. 5 (questioning the statutory basis for municipal entities as “independent” municipal entities). Also, note that the definition of “state agency” includes “any **independent** state authority, district, commission, instrumentality or agency...” (emphasis added), whereas the definition of municipal agency does not include the word “independent”. G.L. c. 268A, §1(f) and (p).

<sup>3</sup>“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

<sup>4</sup>“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>5</sup>Each member municipality has an interest in the revenues received by the Land Bank as the amount will affect each municipality’s contribution to the fund, any debt in which the full faith and credit of the municipalities has been pledged, and the extent to which the Land Bank, as an instrumentality of each member town, may fulfill its land acquisition mandate.

<sup>6</sup>We note that, even if the position of Land Bank Commissioner is designated as a “special municipal employee”, (as discussed below) §17 will prohibit a Commissioner from serving as the seller’s broker because the sale is a matter within his official responsibility as a Land Bank Commissioner and is pending in the agency in which he is serving.

<sup>7</sup>In order for Land Bank Commissioners to receive this designation, they must be so designated by the boards of selectmen of all member municipalities. *EC-COI-92-27*.

<sup>8</sup>Section 20(d) permits a special municipal employee to have a financial interest in a contract with the municipality, involving the board on which he serves, if he files a full disclosure with the town clerk and receives the approval of the Board of Selectmen.

<sup>9</sup>This advice is limited to an application of G.L. c. 268A and is not intended to comment on the appropriateness of a policy permitting Land Bank Commissioners to act as paid real estate brokers for the Land Bank. We note that if the Land Bank Commissioners designate a member to act as a broker, G.L. c. 268A, §19 will prohibit the designated Land Bank Commissioners from participating in the designating decision. Further, the other Land Bank Commissioners will be required to comply with G.L. c. 268A, §§23(b)(2) and 23(b)(3), when making the decision. These Commissioners will be required to make a full written disclosure under §23(b)(3).

<sup>10</sup>If a real estate firm in which the advisory board member or Land Bank Commissioner is affiliated receives a commission from such a sale, the firm should segregate its fees from any compensation paid to the municipal employee. *EC-COI-89-5*.

<sup>11</sup>In a related issue under §19, we note that a Land Bank Commissioner who is also a local municipal employee may participate in matters in which his municipality has a financial interest. *EC-COI-92-26*. In this situation, the employee is considered to be serving two municipal agencies and, in each capacity, is acting on behalf of the municipality. We now decline to follow our opinion in *EC-COI-90-2* where we stated that a Land Bank Commissioner who is also a local municipal employee may not participate in matters affecting his town because we no longer consider the Land Bank to be an independent municipal entity.

<sup>12</sup>These materials are defined as “materials or data within the exemptions to the definition of public records as defined by [G.L. c. 4, §7].”

<sup>13</sup>The questions that you have asked are generic in nature. We recommend that Land Bank Commissioners and advisory board members seek further guidance regarding specific fact situations and conflict issues about themselves that arise in the future.